IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9273 of 2004
With
SPECIAL CIVIL APPLICTION NOS. 9275, 9276
and 9289 OF 2004.

For Approval and Signature:

HON'BLE MR.JUSTICE D.N.PATEL

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

UTTAR GUJARAT PATEL NAGAR CO OP HOUSING SOCIETY LTD. PART-1
Versus
SHISHU VIDYA MANDIR THRO.PRINCIPAL

Appearance:
MR MB GANDHI for the Petitioners.
MRS TRUSHA M GANDHI for Petitioners.
MR BG JANI for the Respondents.

CORAM : HON'BLE MR.JUSTICE D.N.PATEL

Date of decision: /08/2004

COMMON CAV JUDGEMENT

The petitioner has preferred these petitions under Article 227 of the Constitution of India, whereby the petitioner has challenged the judgment and order dated 16th July, 2004 in Appeal From Order Nos. 43, 44 and 45 of 2004 passed by the Appellate Bench of Small Cause Court, Ahmedabad and for a declaration that the property bearing mark Nos. E, F, H, I is in exclusive possession of the landlord, i.e. present petitioner (original defendant-appellant.) "A", "B", "C", "D", E", "F", "G", "H" and "I" are parts of the properties which are referred initially in the panchnama drawn by the Court Commissioner and subsequently by both the courts below.

2. It is submitted by the learned counsel for the petitioner (original defendant in the suit and appellant in Appeal from Order before the Appellate Bench of Small Cause Court, Ahmedabad) that the respondent (original plaintiff) had preferred H.R.P. Civil Suit no.2129 of 2003 alongwith injunction application exh. 6. Upon hearing both the parties, Small Cause Court no. 13, Ahmedabad passed the following operative order on 11th June, 2004 below application exhs. 6, 20 and 40 in HRP suit no.2129 of 2004.

"1. Ex parte injunction granted earlier in terms of paras 9(A) and 9(D) is hereby made absolute till hearing and final disposal of this suit.

2. The defendant is hereby directed to remove his lock on entrance gate for entering in class rooms "E", "F", "H" and "I" till hearing and final disposal of this suit.

3. The defendant is hereby restrained from applying lock on the entrance gate for entering into class rooms "E", "F", "H" and "I" till hearing and final disposal of this suit.

4. The application exh. 20 is hereby allowed. In exh. 6, the Court has granted relief prayed in para 9(B) of that application and therefore, it is not necessary to grant repeated relief of this application at para 3(a). So, in view of the order passed in terms of para 9(b), the said prayer has been already granted. The plaintiff's application is allowed and the prayer (c) of relief para 3 is granted and the defendant is hereby directed to remove his lock applied on "E" portion till hearing and final disposal of this suit.

5. Application exh. 40 is also allowed. The defendant is hereby directed to remove the lock

applied by him on portion "F" till hearing and final disposal of this suit."

3. Being aggrieved by the aforesaid order, three Appeals from Order bearing Nos. 43 of 2004, 44 of 2004 and 45 of 2004 were preferred by the petitioner before the Appellate Bench (II) of Small Causes Court, Ahmedabad. Upon hearing both the parties, the following directions have been given by the Appellate Bench of Small Causes Court, Ahmedabad.

"1. Appeals are partly allowed.

2. The order passed by learned trial Judge below exh. 6, exh.20 and exh.40 in HRP Civil Suit no. 2129 of 2003 is hereby set aside and substituted as under.

3. Both the parties are entitled to use portion "I". The plaintiff-school children shall use portion "I" during school hours on working days only whereas staff member can use even on holidays if they are attending school. Subject to this, landlord is entitled to use portion "I"at any time including school hours. Both the parties are hereby restrained from causing any kind of obstruction or inconvenience in such enjoyment by the other.

4. The plaintiff school is permitted to use portion "H" only for the ancillary purpose of using portion "I" and "F" only during school hours on working days and no further. The landlord is hereby restrained from causing any obstructions or inconvenience in such enjoyment of portion "H" during school hours on working days by the plaintiff.

5. The parties shall not disturb the keeping of articles of respective party in room "E" and "F" till final disposal of suit as found in commissioner report mark 4/8. Subject to this the landlord is hereby given mandatory direction to make room "E" and "F" available on each working day for plaintiff's use during the period from one hour prior to beginning of school time till 1/2 hour after the closing time of school hour on such working day only.

6. The landlord-appellant is restrained from arranging any kind of programme or party during school hours as aforesaid on any working day so as to cause any kind of obstruction or inconvenience in the use by plaintiff of portion "E", "F", "H", "I" to the extent as aforesaid.

7. The landlord is directed to make portion "E",

"F","H", "I" clean immediately, whenever, beyond school hours as aforesaid, the landlord uses the premises for any programme or party.

8. The landlord-appellant is hereby directed to open the locks on iron gate immediately and on room "E" and "F" from tomorrow as per this order hereinabove.

9. Period of school hours referred in this order shall be the period of two shifts working immediately prior to the summer vacation of 2004 including intervening period between two shifts.

10. Applications exh. 6, 20 and 40 filed before the trial court and corresponding A.F.O. 43/04, 44/04 and 45/04 are hereby disposed off accordingly. No order as to costs."

4. It is contended by the learned counsel for the petitioner (original defendant-appellant) that the courts below have not properly appreciated the fact that the premises demarcated as "E", "F", "G", "H" and "I" are exclusively owned and possessed by the petitioner since long. Only portions "A", "B", "C" and "D" of the disputed premises have been given on rent to the respondent school. The aforesaid fact is explicitly clear from the panchnama prepared by the Court Commissioner. This aspect of the matter has not been properly appreciated by the courts below and hence, the orders passed by the courts below deserve to be quashed and set aside.

5. The learned counsel for the petitioner further submitted that the respondent had also preferred one HRP suit no. 501 of 2002 wherein it was prayed that the present petitioner be restrained from dispossessing the respondent's property in question. In the said suit, ex parte injunction was granted in favour of the present respondent. Subsequently, the said Court partly vacated the injunction order and thereafter, the respondent had withdrawn HRP Civil Suit no. 501 of 2001. This aspect of the matter has not been properly appreciated by the lower appellate court, that once a separate civil suit was filed bearing HRP Civil Suit no.501 of 2001 by the respondent for the very same property, for not dispossessing at the behest of the petitioner and thereafter, withdrawal of the said suit creates a situation akin to estoppel or resjudicata for the present respondent. Had this fact been properly appreciated by the lower appellate court, the impugned order would not have been passed by the Appellate Bench of Small Cause Court. Initially, the respondent was given only "A",

"B", "C" and "D" parts of the property on rent when the respondent was running a school upto standard three. Thereafter, the the respondent school started an additional standard i.e. 4th standard and therefore, they were in need of an additional room. The request was made by the respondent to the petitioner for allowing use of an additional room in the said property. In fact, the permission granted by the State of Gujarat to impart education by the respondent school has already been cancelled, but a writ petition has been preferred by the respondent and the school is being run not on the basis of the permission of the State of Gujarat, but on the basis of the interim injunction granted by this Court in Special Civil Application No.837 of 2004. The cumulative effect of the aforesaid circumstances leads to the fact that the judgment passed by the lower appellate court is not only de hors the law, but also de hors the facts. It is also contended by the learned counsel for the petitioner that "Chandla" ceremony of Prabhulal Anjarilal's daughter had also taken place in the said premises, that is, in the rooms other than "A", "B","C" and "D" which are in possession of the petitioner. A document at mark 24/16 was also placed on record before the trial court to the effect that the petitioner has recovered rent of kitchen and utensils from Prabhulal Anjarilal Soni alongwith receipt at mark 24/17. The aforesaid ceremony had taken place on 29th April, 2004. From the aforesaid facts, it is clear that the respondent was in possession of the premises "A", "B", "C" and "D" only and not rest of the parts of the premises. This aspect of the matter has not been appreciated by the lower appellate court and hence, the judgment passed by the lower appellate court deserves to be set aside.

6. Upon issuance of the notice, the respondent has appeared through its advocate. The learned counsel for the respondent mainly contended that not only the parts "A", "B", "C" and "D" are in possession of the respondent, but the parts "E", "F" and "H" are also in possession of the respondent. So far as part "I" of the disputed premises is concerned, there is a water tank and wash area and WC construction. So far as portion "H" is concerned, it is open paved construction covered by iron sheet angles. This is evident from the panchnama drawn at mark 13/2. Thus, portion "A" including "A/1" is for office and computer room, portions "B", "C", "D", "E" and "F" are class rooms, portion "G" is in possession of the petitioner. So far as portion "H" is concerned, is an open premises and "I" is a wash area with water tank and WC. Thus, portions "H" and "I" area were used commonly and jointly

by the respondent as well as by the petitioner. Thus, only portion "G" of the premises was in exclusive possession of the petitioner which has been retained by them and upon appreciation of these very documents, that is, marks 13/2 and 13/4 (panchnama and map respectively) prepared by the Court Commissioner, the lower appellate court has arrived at a true and correct conclusions and hence, the petitions preferred by the petitioner are devoid of any merits and deserve to be dismissed. It is also averred by the learned counsel for the respondent that the petitioner has preferred one civil suit bearing HRP Civil Suit no. 3591 of 2002 for getting possession of all the aforesaid rooms which are in exclusive possession of the respondent. The filing of the said HRP Civil Suit no. 3591 of 2002 tantamounts to admission on the part of the petitioner so far as present HRP Civil Suit no. 2129 of 2004 is concerned. It is the consistent say of the respondent (original plaintiff) in HRP Civil Suit No. 2129 of 2004 before Small Cause Court, Ahmedabad that the respondent is in exclusive possession of the suit premises and the petitioner is forcibly taking way the possession by applying their locks. This fact is made clear looking to the suit filed by the petitioner before the very same Court bearing HRP Civil Suit no. 3591 of 2002. The said suit has been preferred by the petitioner for getting possession of the suit premises from the respondent. In the prayer of the HRP Civil Suit no. 3591 of 2002, preferred by the petitioner before very same Court, it is prayed that portions "A", "B", "C" and "D" has been given on rent and possession of the property bearing marks "E", "F", "H" and "I" should be restored to the petitioner which are in possession of the respondent. Thus, no sooner did HRP Civil Suit no. 3591 of 2002 was filed by the petitioner before the Small Cause Court at Ahmedabad, the earlier suit filed by the respondent bearing HRP Civil Suit no. 501 of 2001 was rightly withdrawal because the present respondent had preferred HRP Civil Suit no.501 of 2001 against the petitioner for getting permanent injunction against the petitioner so that the respondent can enjoy the property in question which was in possession of the respondent. Thus, no sooner did this fact has been admitted by the petitioner, (the fact of possession of the property by the respondent) in HRP Civil Suit No. 3591 of 2002, there was no reason for the respondent to continue that with HRP Civil Suit no. 501 of 2001 and therefore, the same was withdrawn. Thus, what was insisted by the respondent in HRP Civil Suit no. 501 of 2001 was admitted by the petitioner in its Suit bearing HRP Civil Suit no. 3591 of 2002, but the petitioner, one day forcibly took possession of certain rooms of the

disputed property without waiting for final outcome of HRP Civil Suit no. 3529 of 2001, and, therefore, the present respondent was compelled to file HRP Civil Suit no.2129 of 2004 alongwith injunction application exh. 6. The petitioner, without waiting for the outcome of its own HRP Civil Suit no 3591 of 2002, applied the lock at the doors of the class rooms at the premises bearing "E", "F" as well as of the premises "H" and "I". Thus, "E" and "F" are class rooms which have now practicably become unusable and portion "H" is an open shed, whereas, portion "I" is having water tank, wash room and bathroom for the students. The same premises is also locked unilaterally, arbitrarily and vexatiously, by the petitioner, though their suit bearing HRP Civil Suit no. 3591 of 2001 was already pending. In fact, had there been any emergency by the petitioner, they should have applied in their own pending suit. But instead of taking recourse of legal proceedings, absolutely arbitrarily, entrance for the premises "E", "F", "H" and "I" was locked by the petitioner. Looking to the aforesaid facts, both the courts below have passed absolutely balanced orders by giving directions to both, the respondent (original plaintiff in HRP Civil Suit no. 2129 of 2004) as well as petitioner (original defendant of HRP Civil Suit no.2129 of 2004.) There is no error in the judgment passed by the lower appellate court. The panchnamas marks 13/1 and 13/2 make it abundantly clear that except premises "G", the premises "A", "B", "C", "D", "E" and "F" are class rooms, portion "H" is a sort of open construction on iron angles, a shed, whereas portion "I" is concerned, it is having water tank, wash area and WC. Looking to the long duration of usage of the aforesaid property by the respondent, the judgment passed by the lower appellate court is true, correct, and in consonance with facts and law.

7. I have perused the papers, documents and the impugned judgment. Looking to the facts and circumstances of the case, I am of the clear opinion that there is no error committed by the lower appellate court while passing the judgment dated 16th July, 2004 in Appeal from Order No. 43, 44 and 45 of 2004 by the Appellate Bench of Small Cause Court, Ahmedabad, much less an error apparent, on the face of the record. There is neither a perversity in the judgment nor a jurisdictional error in the judgment. On the contrary, the judgment passed by the Appellate Bench of Small Cause Court, Ahmedabad in Appeal from Order no. 43, 44 and 45 of 2004 is true, correct and in consonance with facts and law. I am therefore, in full agreement with the reasons assigned by the lower appellate court.

8. As HRP Civil Suit no. 2129 of 2004 is already pending before the trial court, there is no need to go into fine nicety of facts and appreciation of evidence at this stage. But suffice it to say that looking to the documents at marks 13/1 and 13/2 which is a panchnama of the disputed premises, in my opinion, the judgment passed by the lower appellate court is true, and correct. Similarly, filing of HRP Civil Suit no. 3591 of 2002 by the petitioner for getting possession of the disputed premises from the respondent also suggests that the possession of the disputed property is in belligerent stage. In H.R.P. suit no. 501 of 2001 filed by the respondent, injunction application filed by the respondent was rejected by Small Cause Court, Ahmedabad. Appeal from Order No. 47 of 2001 was also rejected by the Appellate Bench of Small Cause Court at Ahmedabad. Against that order, respondent (i.e. original plaintiff of H.R.P. Suit no. 501 of 2001) had preferred Civil Revision Application No. 1261 of 2001 before this Court. In Civil Revision Application, this Court passed the following order on 30.10.2001.

" Heard the learned counsel for the respective parties. Rule. Injunction as originally granted by the Trial Court to continue in respect of the rooms marked "A" to "F" in the Commissioner's report. However, the respondent shall be entitled to and the petitioner shall allow them to have access to and use the rooms "E" and "F" after school hours and on holidays whenever the respondent needs them for the purpose of use as Wadi. Both parties shall be entitled to use the portions "H" and "I". The Trial Court is directed to dispose of the suit within six months from the date of receipt of this order."

Workable formula arrived at during pendency of the case before the trial court is absolutely correct and proper, with a view to avoid further hardship to the students of the respondent school The aforesaid factor which is over and above the factors prima facie case, balance of convenience, and irreparable loss, which are in favour of the respondent.

9. Special Civil Application No. 9289 of 2004 has been preferred by the petitioner who is the original plaintiff in HRP Civil Suit no. 2129 of 2004 and is challenging the same judgment dated 16th July, 2004 passed by the Appellate Bench of Small Cause Court, Ahmedabad in Appeal from Order Nos. 43, 44 and 45 of

2004. The learned counsel appearing for the petitioner school submitted that there are enough cogent and convincing evidences to the effect that the school is in exclusive possession of the premises "A", "B", "C", "D", "E", "F", "G" and "H", but the lower Appellate Court has not appreciated the evidence and has erroneously arrived at a conclusion that the school has failed to prove the tenancy rights over the rooms "E" and "F" and portions, "H" and "I" and hence, the judgment passed by the lower appellate court deserves to be quashed and set aside.

I have perused the papers and the orders passed by the Courts below. As stated hereinabove, exclusive possession of the school who is the plaintiff in HRP Civil Suit no. 2129 of 2004 is yet to be proved on the basis of the appreciation of evidence and deposition of witnesses as the suit is already pending before Small Cause Court, Ahmedabad. Looking to the panchnama as stated hereinabove, filing of HRP Civil Suit no. 2129 of 2004 by the society and the order passed by this Court in Civil Revision Application no. 1261 of 2001 and upon appreciating the evidence on record, the conclusion arrived at by the lower appellate court is true and correct. Hence, there is no substance in the petition filed by the petitioner-school and it deserves to be dismissed.

11. In view of the above facts and circumstances, I am in full agreement with the reasons assigned by the lower appellate court. I therefore, see no reason to take any deviation from the conclusions arrived at by the lower appellate court. There is therefore, no merit in these Special Civil Applications, as a result, the petitions deserve to be dismissed. Accordingly, the petitions are dismissed. Rule discharged in each petition with no order as to costs.

(D.N.Patel,J)

After pronouncement of the judgment, the learned counsel for the petitioner in Special Civil Application nos. 9273, 9275 and 9276 of 2004 submitted that the stay granted earlier by this Court may be continued for a further period of eight weeks so that the petitioner in these petitions can approach higher forum. Looking to the facts and circumstances and the reasons assigned in the judgment, the prayer for extension of stay is not acceded to.

(D.N.Patel,J)

***darji